(19)

No. 83-2004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MATSUSHITA ELECTIC INDUSTRIAL CO. LTD., *et al.*
PETITIONERS
V.
ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE SEMICONDUCTOR INDUSTRY ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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The Semiconductor Industry Association Submits This Brief As Amicus Curiae.

INTEREST OF THE AMICUS CURIAE

The Semiconductor Industry Association ("SIA") is a non-profit association which represents over fifty manufacturers of semiconductor devices, accounting for over 95% of all semiconductors fabricated in the United States. Revenues of the U.S. based industry reached $14 billion in 1984.

These microelectronic devices are not only the heart of many emerging industries, such as telecommunications and personal computers, but also the key to the competitiveness of many traditional industries, such as automobiles and appliances.

SIA and its member companies are dedicated to the principles of free and fair trade throughout the world. For example, in 1984 SIA spearheaded an effort for legislation which has resulted in elimination of all tariffs for semiconductor products in both the United States and Japan. Also, the Association is currently engaged in broad scale efforts to open Japanese semiconductor markets to American producers. SIA is firmly committed to the American competitive system and the antitrust laws and believes they should be enforced fairly and uniformly, both for the benefit of consumers and also to keep the United States domestic market open fairly and equally to all competition, whether from domestic or foreign entities.

Neither SIA nor any member company has a direct interest in the outcome of this litigation.[1] However, SIA believes a decision in this case may constitute a precedent, or establish a rule of law, which may have serious effects upon competition in domestic markets and freedom of trade.

SIA takes no position as to the merits of respondent's case, or whether the petitioners violated the antitrust laws. However, SIA submits that respondent is entitled to a trial and that summary judgment was not appropriate. This brief

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[1]This brief is submitted by the Association and does not necessarily state fully the views of every member. Motorola, Inc., a member of SIA, was initially a defendant in these proceedings, but the case against it was dismissed by the District Court. Motorola has not participated in or provided any financial support, directly or indirectly, towards this motion and brief.

treats only the "sovereign compulsion" issue raised by petitioners and the government amici curiae. It is submitted that, to the extent that any participant in domestic markets is permitted to engage in anticompetitive activities of a type forbidden by United States antitrust laws, to that extent both free competition and free trade will be impaired. That result would be unfortunate, whatever the claimed justification.

Amicus is seriously concerned with possible effects of a decision here upon competition and trade in other industries, such as semiconductors. It is imperative to appraise such effects in the light of the ever-growing intervention of foreign governments in trade matters, not limited to protection of their own markets from foreign competition, but in promotion and subsidization of exports. Where governments intervene in commercial activities, they become interested parties whose stated interest in specific litigation goes beyond a normal governmental role. Automatic application of concepts, such as "Act of State" or "sovereign compulsion" would create a *per se* defense to antitrust enforcement which would impinge directly upon all competition in all industries.

SUMMARY OF ARGUMENT

Amicus urges the Court to affirm the decision of the Court of Appeals which reversed the summary judgment granted by the District Court. The Court of Appeals properly considered the representations of the Government of Japan, and specifically the 1975 MITI statement. Although recognizing that "sovereign compulsion" could be a defense in a proper case, the Court of Appeals correctly decided that neither the alleged governmental compulsion nor the governmental representations concerning it were conclusive in this case.

Although "sovereign compulsion" has been discussed by several courts and commentators, most courts have not actually applied it as a defense in the case before them. The concept is not well established and as universally applied as the "Act of State" doctrine, which is not applicable in this case because the validity of governmental acts is not at issue.

Even if "sovereign compulsion" is accepted as a potential defense, respondents have offered evidence that petitioners did not comply with the government mandate and therefore were not subject to such compulsion. Also, their acts went beyond that which the government states was mandated by it. A representation of a foreign government made after the alleged activities of petitioners, stating, in effect, that whatever they did was mandated by the government cannot be conclusive on the courts to exempt them from U.S. antitrust laws which would otherwise make such activities illegal. "Sovereign compulsion" does not provide a *per se* defense, and the court is not precluded from evaluating the facts. This is best done upon a full record after trial. The antitrust laws of the United States and the right of enforcement by injured private plaintiffs is mandated by the Congress. These important objectives cannot be subrogated to principles as poorly defined and established as the concept of foreign "sovereign compulsion." American markets are the largest in the world, and the antitrust laws are designed to provide free competition in these markets for both domestic and foreign competitors. No exemptions from the principles of free competition should be granted lightly, and there is no basis in the record of this case to grant such an exemption.

The "sovereign compulsion" concept has limited international acceptance. Neither petitioners nor amici curiae supporting petitioners have demonstrated such international

acceptance, or even acceptance in their own nations. Also, the principles which these amici urge upon the court, such as comity, would appear to apply equally to restrict any attempt by a foreign government to authorize or direct activity by that government's nationals, which is specifically targeted towards U.S. commerce, and which would constitute a violation of U.S. antitrust laws.

The voluntary restraint programs between the United States and other nations are not an issue in this case, and no decision of this court affirming the decision of the Court of Appeals would cast any doubt upon such programs. Foreign governmental export restraints need not delegate to private companies the right to reach agreements as to prices and allocation of customers which would be in violation of U.S. antitrust laws.

The United States Government has advanced a novel argument that "sovereign compulsion" is a *per se* defense in private antitrust litigation, whereas Government enforcement authorities should not be barred by any such concept. Not only does this argument indicate the fallacies in conclusive *per se* application of "sovereign compulsion" as a defense, but the suggested distinction has no basis in law and is contrary to the Congressional mandate for "private attorneys general."

"Sovereign compulsion" is not a well-defined doctrine and should be sparingly applied, particularly to provide exemption from the antitrust laws. Distinctions must be made between governmental activities promoting business and normal governmental decrees relating to a nation's internal affairs. The "Act of State" doctrine has been held not to apply to commercial activities. Analogously, "sovereign compulsion" may be limited when the mandated activity is of a commercial nature.

ARGUMENT

A. The Court of Appeals Was Correct in Deciding that Recognition of the MITI "Sovereign Compulsion" Statement Would Not Thereby Preclude a Trial on the Merits.

The issue before this court is not whether a "sovereign compulsion" doctrine exists. Neither is it whether the Court of Appeals considered the Japanese government representations or the role of MITI. The Court of Appeals expressly noted the MITI statement and assumed application of a "sovereign compulsion" doctrine in its discussion of the issue.[2] There was no need to mention the 1975 Statement of the Government of Japan because the case presented issues for trial, such as whether the Japanese companies (petitioners here) in fact complied with governmental decrees and whether they went beyond any protection these decrees could give them. It is an issue of fact whether the MITI decrees and compulsion covered the actions which were actually taken by petitioners.

It is a novel concept to suggest that when the evidence in a case indicates that the action in question was different from that which was ordered, the Court cannot allow a trial to determine if what was done was that which the government ordered to be done. If there was no actual "compulsion" of petitioners, the "sovereign compulsion" doctrine cannot apply. If, as respondents' offered evidence indicates, petitioners first reached an agreement as to minimum prices in accordance with MITI's "compulsion" and then, with each other's knowledge, sold at secret prices

[2]Pet. App. 188a-189a. Petitioners' brief at page 36 cites the Court of Appeals' discussion but disagrees with the Court's conclusions. If respondents' evidence is accepted that each of the petitioners had a right of appeal from MITI directives and could withdraw at any time, this alone would negate compulsion and justify the conclusions of the Court of Appeals.

which were below the so-called minimum prices, and this was not disclosed to MITI, and certainly not compelled by MITI, and if the petitioners did so under circumstances where their agreed-upon limit of five customers each curtailed competition between them in the United States market, it is submitted that no "sovereign compulsion" doctrine should protect them. That issue should be tried.

The Japanese letters to the Court did not state that MITI investigated the issue of compliance, or ever evaluated respondent's evidence on those issues. The 1975 statement preceded discovery in the case. If governmental representations such as this are to be treated as *per se* defenses to antitrust suits, that is tantamount to deciding that the fact of "compulsion", the scope of governmental decrees, and compliance with them, can never be made an issue by a U.S. antitrust plaintiff.

Petitioners' brief and those of the amici governments may not on their face appear to seek such a *per se* effect for all foreign government claims of compulsion. Petitioners' statement is that government-mandated acts "cannot constitute a *feature* of an antitrust violation." (P.Br.p.36) (emphasis added). However, as the subsequent argument makes clear, they mean that in any case in which a government states that it compelled parties to enter into an agreement limiting competition among themselves, a conclusive defense under U.S. antitrust laws is created, even if those parties build on that base and engage in both additional activities and activities which violate the government mandate. We submit that this Court should not permit such a blanket statement by the foreign government (e.g., MITI in 1975) to constitute such a *per se* defense.

B. Anticompetitive Practices Directed at U.S. Markets Should Be Excused Only for Compelling Reasons.

If the Court determines that "sovereign compulsion" is an issue here, both the policy imbedded in our antitrust laws

and actual international trade conditions should receive careful consideration. There simply will be no American antitrust laws for protection of American consumers or to insure free competition for American industries if major foreign companies, some of the dominant players on the playing field, can thus be exempted from our current principles of competition.

Foreign relations, sovereign actions and comity must be considered. They cannot be conclusive, however. After litigation has commenced, no foreign sovereign statement can be permitted to usurp all decision-making on all issues presented to the courts. The antitrust laws and congressional mandates for their enforcement are entitled to equal, if not greater, force. The impact on American industry could be tremendous if any exemption to our principles of free competition is granted with respect to activities within the United States domestic market, whatever be the claimed benefits of so doing.

This case does not appear to justify such a sacrifice of the principles of the antitrust laws. The issues here do not involve foreign governmental activity related primarily to the internal affairs of the foreign government. Neither do they involve international transportation or communication which necessarily requires accommodation between the legal systems and regulations of governments on each end of the transaction. No effect on Japanese domestic markets or the activities of its nationals there was intended by MITI. As is clear from the statements of MITI itself, as well as by much evidece in the record, the entire subject matter of this case and the directives described by MITI were sales of

products into United States markets.[3] This is the largest market in the world by far, and it is a market which is fully open to foreign manufacturers. The antitrust laws preserve competition here, and foreign firms receive all the benefits of this free competition. Many major foreign companies now sell more in America than in their home markets. They have full support from their governments, often including subsidized research and development expense, loans and tax benefits for exports.

Some traditional concepts concerning sovereignty may need adaptation to this situation. Where a foreign government adopts policies or mandates actions aimed at this large American market and those activities impinge on our antitrust laws, no *per se* exemption from those laws is appropriate. At least, any such exemption should be accorded only in a very clear case—such as conflict with important policies of the foreign government relating to its internal affairs.

C. Neither the Act of State or Sovereign Immunity Doctrines Are Relevant to This Case.

Petitioners and several amici curiae discuss the Act of State and sovereign immunity doctrines as if they were apposite here. Much judicial support is available for these doctrines, but these are not relevant to this case, other than for general principles such as comity and respect for foreign sovereignty.

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[3]The 1975 MITI statement expressly recognized "the importance of televisions as one of Japan's export products" (Pet. App. 13a) and states that it directed Japanese television companies to enter an agreement "with respect to minimum prices and other matters concerning domestic transactions relating to exports to the United States . . ." and "minimum prices at which televisions could be sold for exportation to the United States . . . ." (Pet. App. 13a).

Unlike the "Act of State" cases, such as *Banco Nacional de Cuba v. Sabbatino*,[4] the Court can consider the "sovereign compulsion" issues in this case without sitting in judgment on the acts of another government done within its own territory, nor need it pass on the validity of foreign acts of state so as to hinder foreign policy. Even if the court in this case reviews MITI's directives, that would not constitute an attack on the validity of the decrees or a challenge of MITI's interpretation of them. Certainly Japan's "sovereign immunity" is not an issue here.

Even if the principles underlying the Act of State doctrine are considered as relevant, as noted in *Sabbatino*, application of the doctrine is not required by international law[5], and is not a constitutional issue.[6] Most countries do not apply it rigidly and civil law nations make exceptions for acts contrary to their sense of public order[7]. Justice White's dissent in *Sabbatino* notes that courts of Japan, England and France have examined a fully executed foreign "Act of State" expropriating property[8]. Thus, even if MITI's directive was analogized to an "Act of State," it would not constitute a *per se* defense.

D. The Sovereign Compulsion Concept has Limited International Acceptance.

A "sovereign compulsion" concept has not yet been given much credence by the courts. Petitioners' brief cites the relevant authorities at pages 36-46. They are all American cases. The Semiconductor Industry Association notes the

[4]376 U.S. 398 (1964)

[5]Id. at 421

[6]Id. at 423

[7]Id. at 421 n.21

[8]Id. at 440 n.1

complete absence of anything in the brief of the amici governments as to the extent of international acceptance of the "sovereign compulsion" concept. Just when and to what extent is it now applied internationally? Semiconductor Industry Association members compete worldwide against both the petitioners and major companies from the nations speaking here as amici curiae. To our knowledge, never have we met the doctrine overseas.

Sovereign immunity and Act of State doctrines have international acceptance, although the extent of the application of these doctrines varies by country. However, as to "sovereign compulsion" we note that the citations in the amici brief are limited to U.S. cases, and there are but few of these. There are no claims that their nation's courts have adopted, or even favorably commented upon, a policy for them to immunize foreign companies from compliance with their laws, based solely upon the foreign government's representation that it compelled the violating action. We do not urge that strict reciprocity is required in applying comity and similar concepts,[9] but the extent of a doctrine's recognition by foreign governments sheds much light on whether it is a concept where foreign relations issues are truly present in the case.

There is little evidence that the United States Government has sought such an exemption from foreign laws for American companies operating within foreign nations, and it certainly has not done so as to commercial activities overseas. Laws which have exempted certain activities from application of U.S. antitrust laws do not purport to grant American companies the right to violate foreign laws.

[9]*Sabbatino*, id at 411-2, holds that reciprocity is not a requirement for an Act of State defense but notes that it does apply to recognition of foreign judgments.

It may also be relevant to consider whether the MITI directives and compulsion here in issue gave appropriate consideration to United States laws and policies in the first instance. Respondents offer to prove that petitioners' acts constituted antitrust violations, and the Court of Appeals held that was a tryable issue in this case. The Government of Japan says that petitioners must be exonerated because MITI told them to do it. MITI does not state whether or not it knew whether or not the acts it says it directed were violations of U.S. law, or whether it ever considered that possibility. Principles of comity might suggest that a foreign government might refrain from directing its nationals to engage in activities directed at U.S. domestic markets which are illegal here.

Surely MITI could not have expected that it could confer immunity from U.S. law if the activities it directed were to be performed within United States territory. The result should be no different if actions designed specifically to affect U.S. commerce were performed outside American territory. Principles of comity ought to cause a foreign sovereign to try to refrain from so acting. If it does not refrain but instead urges or compels its nationals to perform acts directly affecting U.S. commerce, it should not later be permitted to claim that its governmental compulsion will be a *per se* defense to enforcement here.

No charge is made in this brief that law violation was intended, or that the Court should inquire into the issue. Affirmance of the Court of Appeals decision would not require that. But the Court could note that petitioners were huge international companies with extensive operations in this country and worldwide and were not likely to be involved in these activities inadvertently. They had the best available legal advice from major American law firms. MITI states that it intended that the activities would involve

exports to the United States. Agreements as to prices are *per se* antitrust violations here. Agreements for allocation of customers always are suspect under the antitrust laws. It is difficult to believe that was not generally known in Japan. When activity is directed expressly towards sales in the United States, a government which expects its directives to be accepted ought first to insure that what it compels its nationals to do is not illegal here. Comity should work both ways. We refer the Court to J. Atwood and K. Brewster, *Antitrust and American Business Abroad*, 267 (2d Ed. 1981), stating:

> "Further, rules of comity impose limitations on the extraterritorial application of foreign government decrees . . . ."

E. The Validity of Voluntary Restraints Has No Relevancy to the Claim of "Sovereign Compulsion."

Both petitioner and amici curiae have referred to the benefits of voluntary export restraints of foreign governments. They point to United States Government assurances that our antitrust laws are not violated by them. That argument is little more than a red herring. Affirmance of the Court of Appeals decision would not cast any doubt on the validity of reasonable voluntary restraint programs.

Wholly aside from the real question of whether United States Government assurances of legality prevent a private antitrust suit,[10] it is not contended that foreign government export controls and mandated restraints on exports are a violation of U.S. antitrust laws. It is doubtful, however, if

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[10]Contrast the position of domestic companies under Department of Justice Business Review procedures which are normally very limited and do not provide any immunity from suit either by private parties or by the government itself if it changes its mind. (28 C.F.R. § 50.6)

the voluntary restraint program of the United States ever did or should go so far as to immunize foreign companies—as distinct from the foreign government itself—from any prosecution for any agreements as to prices or allocation of customers. It is likely that such statements as our government has given to foreign governments on voluntary restraints can reasonably be interpreted as sound advice on the scope of our antitrust laws, not as an exemption from them.

In any event, all the benefits from voluntary restraints can be effectively achieved by a foreign government through governmentally administered export controls. There is no need for the foreign government to delegate to a group of its companies the right to reach agreements as to prices and customers to achieve those objectives, particularly if those agreements would constitute violations of U.S. law except for such foreign governmental directive. It may be proper for a foreign state to restrict exports, but it is an entirely different matter to suggest that it should have unquestioned freedom to assure orderly export markets.

Nevertheless, this case does not raise such issues. MITI's actions were not a part of any voluntary restraint program. Voluntary restraint simply is not involved here.

F. There is No Basis for A Distinction Between Private Enforcement and Governmental Enforcement of the Antitrust Laws.

The brief for the United States as amicus curiae supporting petitioners, beginning at page 20, expressly recognizes that there are issues of scope concerning the foreign compulsion defense. The complexity of the entire issue is well illustrated by this discussion. Foreign government compulsion simply cannot be a *per se* defense to U.S. law violation

based upon a foreign government's mere claim of that compulsion.

The United States Government agrees that the concept should not always be applied. At page 23 of its brief, the United States government seeks to reserve to itself the right to make that decision. A novel principle is announced which differentiates between private treble damage antitrust suits and antitrust actions brought by the United States Government. At least as to antitrust cases, that idea has no basis in law. Although the United States Government can and does exercise judgment on the wisdom of bringing particular antitrust enforcement actions, the antitrust laws as enacted by Congress do not give the government the sole right of enforcement. Citation of authority is not necessary for the proposition that private parties have an independent right of enforcement, which is encouraged by the treble damage policy. Nowhere does the statute provide for executive branch interference or limitation of the Congressional grant of this private enforcement right.

The courts in all cases may always be open to representations by the Government as to foreign policy considerations, international law, comity and deference to the legitimate acts of foreign governments. Appearance of the Solicitor General to state such views is commonly accepted. Also, where foreign policy is entrusted to the executive branch, its decisions may on occasion have binding effect. However, as to application of domestic antitrust laws for conduct directed at U.S. commerce, international considerations cannot be binding upon the courts in the absence of appropriate duly adopted treaties or executive agreements.

This is not merely a procedural issue. To adopt it would be equivalent to establishing a substantive rule of law which would exempt conduct from enforcement of the antitrust

laws in some circumstances, and not exempt the same conduct in other circumstances. That would be done solely upon the decisions of the antitrust enforcement authorities of the United States Government. Regardless of any merit to such a concept, that is not the Congressional mandate under the antitrust laws.

G. The Facts of This Case Are Not Appropriate for Applying A "Sovereign Compulsion" Concept.

If, in the opinion of this Court, some ruling on the issue of sovereign compulsion is necessary, we submit that this is not an appropriate case for recognizing it as a defense.

Although often discussed, the concept has been applied only once.[11] In *Interamerican Refining Corp.* v. *Texaco Maracaibo Inc.*, 307 F. Supp. 1291 (D. Del. 1970), political expatriates from Venezuela attempted to set up business in New York to resell oil purchased in Venezuela for bunker fuel and into international markets. They were *persona non grata* with the regime in power, which prohibited sales to them. The resulting refusals to sell by defendants were held not to justify the antitrust suit. The government's directives essentially involved internal Venezuela politics, and no imports into the United States were affected. The governmental interest in that case was "political" in nature.[12] The facts

[11]At least since the broad language in *American Banana Co. v. United Fruit Co.* 213 U.S. 347 (1909) has been limited by this Court. See Fugate, *Foreign Commerce and the Antitrust* Laws 143 (3d. ed. 1982)

[12]See *J. Atwood and K. Brewster, Antitrust and American Business Abroad* 248 (2d ed 1981) discussing a foreign governmental role which was not decisive because "no special political factors" were involved, citing *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979).

of all the other cases so far have not fit into the rule.[13] Apparently, most courts faced with tangible facts have seen the potential pitfalls in a doctrine which exempts private activities from compliance with otherwise applicable U.S. laws merely because a foreign sovereign claims it legitimized those activities. Any dicta stating that actual compulsion would be binding is not very persuasive for that reason, and at least one court has questioned such broad statements.[14]

Before this Court further sanctions the concept on a summary judgment record, some principles and distinctions require consideration. The briefs of amici governments attempt to oversimplify the issue. The doctrine cannot really mean that a valid U.S. law cannot be enforced as to activities otherwise unlawful simply because a foreign government represents that it directed the violators to engage in the violating activity. For example, no one would seriously contend that a foreign directive would legitimize an agreement reached on foreign soil to commit a felony involving murder or deadly injury committed in the United States. If the intended purpose of the mandated agreement

[13]See *Continental Ore Co. v. Union Carbide & Carbon Corp.* 370 U.S. 690 (1962); *Mannington Mills, Inc. v. Congoleum Corp.* 595 F.2d 1287 (3d Cir. 1979); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978); *Linseman v. World Hockey Ass'n.*, 439 F. Supp. 1315 (D. Conn. 1977).

[14]See comment in *Atwood and Brewster, supra*, note 12 at 264 recognizing such authority but stating that there is little precedent and noting (n.143) *Sabre Shipping Corp. v. American President Lines*, 285 F.Supp. 949, 954 (S.D. N.Y. 1968), *cert. denied*, 407 F.2d 173 (2d Cir. 1969), *cert. denied, sub nom Japan Line, Ltd. v. Sabre Shipping Corp.*, 395 U.S. 922 (1969). (A directive of the Japanese government, if proven, "would not necessarily immunize [Japanese firms] from prosecution or civil responsibility for acts done in United States commerce").

was legal, but the participants went beyond the mandate, their acts would not be legitimized.

Prior cases have recognized implicitly that the concept cannot be so applied—that it has some limits. The Japanese Government's position in this case seems to reflect an attempt to respond to these limits. For example, the clear compulsion which was held to be absent in the *Swiss Watch* case[15] is claimed here. The amici brief of the Government of Japan at page 5 goes further and affirms that whatever was done by petitioner was mandated. No evidence of any compulsion contemporaneous with the activities in question (the 1960's) has been offered. The first representation of the existence of compulsion apparently came in MITI's 1975 statement, five years after the NUE complaint was filed. In light of this broadening of the governmental representations and this sequence of events, we question whether a federal court should eschew some independent look at the timing and extent of the claimed compulsion.

SIA does not suggest any need to examine into the validity or scope of MITI decrees in this case, but it may be helpful to suggest some possible limits which the courts might apply to extraterritorial effects of foreign government directives as applied to U.S. commerce. First, it should be noted that courts have reviewed governmental actions and recognized limits, as is evidenced by the court's decision in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976) *cert. denied*, No. 84-1761 (June 1985). Criteria to be applied stated in generalities are not particularly helpful, except as a starting point. They seem rooted in the past where little recognition seemingly was given to the present day fact of actual par-

[15]*United States v. Watchmakers of Switzerland Info. Center*, 1963 Trade Cas. ¶ 70-600 (S.D. N.Y. 1962).

ticipation by foreign governments in promotion of exports, limitation of imports and support for commercial activities for their nationals. In any event, it is doubtful if the facts of this case bring it within the four criteria listed by *Atwood & Brewster*.[16]

Amicus submits that before a foreign government's policies or directives are given external or extraterritorial effect, that effect should be incidental to a basic internal government interest. Extraterritorial effect should normally not be the primary objective of the decree. Except in rare cases, such as *Interamerican Refining Corp. v. Texaco Maracaibo, supra*, any government directive targeted towards commerce in another designated nation (as distinct from directives generally applicable to international relations) should not fall within the doctrine. That is probably the real basis for the holding in the *Swiss Watch* case, *supra*. Government directives designed to achieve commercial objectives should rarely be entitled to deference. This comports with principles applicable to sovereign immunity and the Act of State doctrines.[17] The more specifically the commercial motive of a decree relates to a single industry, the less likely it is that the decree should be provided recognition.

In a case where a governmental directive relates to commercial activities, if it is designed to apply to a specific industry (e.g., television), if it is directed toward trade with a specific other nation (e.g., the United States) and par-

[16]*Supra*, note 12 at 268.

[17]See *Atwood and Brewster, supra*, note 12 at 250 as to Acts of State and 769 as to sovereign compulsion, citing Justice Department opposition to sovereign compulsion as a defense where the foreign government was acting in a commercial rather than governmental capacity.

ticularly if it delegates the implementation of the policy to the countries' private companies so that rules and details of the program and its enforcement are essentially delegated to those private companies,[18] then we can see few justifications for giving it any deference. The motives of the foreign government may be pure, such as to preserve good international trade, but the motive could also be to advance the commercial and international trade interests of the promulgating government at the expense of companies of the targeted nation. No United States Court should try to decide which of these may have been the true motive, or which was the dominant one, since the decree should have no conclusive effect in either event as applied to U.S. commerce.

Amicus SIA does not underestimate the importance of the principles which lie behind the urgings of the amici governments. However, SIA urges a balancing of these principles against the objectives of our antitrust and other applicable laws. In doing so, abstract principles may need to give way to realities of international commerce. Unlike our government, governments of many other nations actively participate in their companies' business endeavors. Facts relevant to such participation are not readily available to this Court, except in a trial record. Such facts may affect a decision on issues such as alleged "sovereign compulsion."

CONCLUSION

The "sovereign compulsion" doctrine so far is little more than an academic concept, which has been enunciated primarily in cases where it was not applied and in situations where the recognized doctrines of sovereign immunity and

[18]See *Continental Ore, supra*, note 13; *Atwood and Brewster, supra*, note 12 at Sec. 8.16 questioning application to delegated activities.

Act of State were not appropriate. Before more life is breathed into it, its implications must be fully explored. SIA does not claim competence to comment on all aspects of the concept, but as related to commercial activity, fair antitrust enforcement and international trade, SIA has a strong interest. We point to the *Swiss Watch* case[19] which involved comprehensive foreign government promotion of a national industry, and where the "sovereign compulsion" concept was nevertheless found not to apply. The only appropriate conclusion for this Court in this case on this issue is that no "sovereign compulsion" doctrine can reasonably be recognized on this record without a full trial.

If the concept is to be reviewed by the Court, we submit that the concept cannot be recognized where, as here, the foreign governmental directives related to promotion of the commercial interests of the foreign nation applicable to a specific industry, directed against the United States and having no applicability or intended effect upon the internal affairs of Japan.

It is not an unfriendly act to recognize limits to the concept. No argument has been made that it has international acceptance, or has been applied by courts of the amici nations, including Japan.

[19]*United States v. Watchmakers of Switzerland Info. Center, supra.*

Where the concept impinges on American principles as vital as antitrust, the courts must resolve the conflict. No *per se* defense is appropriate.

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